Supreme Court, U.S.
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No. 91-1444

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WILLIAM UTESCH, MICK DREA,
VICTOR C. TOMKA, CLARENCE VOS, *et al.*,
Petitioners,

v.

THOMAS H. DITTMER and REFCO, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Respondents are Thomas H. Dittmer, a citizen of the State of Illinois and Refco, Inc. For purposes of Rule 29.1, Refco, Inc.'s parent corporation is Refco Group, Ltd. which owns 85½% of the stock of Refco, Inc. through a holding company. Refco, Inc. has no nonwholly owned subsidiaries. Refco Group, Ltd.'s nonwholly owned subsidiaries are Refco Capital Corporation and Refco Partners S.A.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. THE APPELLATE COURT'S FINDING OF INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT DOES NOT VIOLATE THE 7TH AMENDMENT	4
II. THE COURT OF APPEALS DID NOT RESTRICT THE RIGHT OF RECOVERY OF PRIVATE LITIGANTS UNDER SECTION 9(b) OF THE COMMODITIES EXCHANGE ACT	6
A. The Court's Ruling Did Not Place an Unwarranted and Unreasonable Restriction on the Petitioners by Requiring Proof of an Artificial Price in the Futures Market	7
B. There Is No Conflict Between the Eighth Circuit's Decision and the Second Circuit's Decision	8
III. THE COURT CORRECTLY APPLIED PERTINENT LAW TO EVIDENCE PERTAINING TO THE PETITIONERS' CLAIM OF CONSPIRACY UNDER SECTION 1 OF THE SHERMAN ACT	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	4
Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935)	4
Bone v. Refco, Inc., 774 F.2d 235 (8th Cir. 1985)	5
Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972)	7
Dudley v. Dittmer, 795 F.2d 669 (8th Cir. 1986)	5
Eichman v. Fotomat Corp., 871 F.2d 784, 795 (9th Cir. 1989)	9, 10
Ewald Bros., Inc. v. Mid-America Dairymen, Inc., 877 F.2d 1384, 1386 (8th Cir. 1989)	9
G.H. Miller & Co. v. United States, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959)	7
General Foods Corp. v. Brannan, 170 F.2d 220 (7th Cir. 1948)	7
Great Western Food Distribs., Inc. v. Brannan, 201 F.2d 476 (7th Cir. 1953), *cert. denied*, 345 U.S. 997 (1953)	7
Greenwood v. Dittmer, 776 F.2d 785 (8th Cir. 1985)	5
H.J., Inc. International Tel. & Tel. Corp., 867 F.2d 1531 (8th Cir. 1989)	10
Horn v. Ray E. Friedman & Co., 776 F.2d 777 (8th Cir. 1985)	5, 6
In re Cox, [1986-1987] Comm.Fut.L.Rep. (CCH ¶ 23,786)	7
In re Indiana Farm Bureau Coop. Ass'n, Inc., [1982-1984] Comm.Fut.L.Rep. (CCH ¶ 21,796)	7
Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch Pierce Fenner & Smith v. Curran*, 456 U.S. 353 (1982)	8
Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1985)	8, 10
McIlroy v. Dittmer, 732 F.2d 98 (8th Cir. 1984)	5
Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982)	8

TABLE OF AUTHORITIES—Continued

	Page
Monsanto Co. v. Spray Rite Serv. Corp., 465 U.S. 752 (1984)	10
Neely v. Martin K. Eby Constr. Co., 386 U.S. 17 (1967)	4
Schuykill & Dauphin Improvement & R.R. Co. v. Munson, 14 Wall 442 (1872)	4
Utesch v. Dittmer, 947 F.2d 321 (8th Cir. 1991)	3, 6
Volkhart Bros., Inc. v. Freeman, 311 F.2d 52 (5th Cir. 1962)	7
Other Authorities	
7 U.S.C. § 13(b)	6
Rule 50 of the Federal Rules of Civil Procedure	4
Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1	9

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Eighth Circuit's opinion in this matter contains a thorough and accurate summary of both the procedural and evidentiary background in this litigation. Respondents believe that the Petitioners' statement of the case is at times inaccurate, incomplete or misleading. Accordingly, while not all *inclusive*, the following corrections and clarifications are submitted.

This litigation pertains to trading in the 1979 October live cattle futures contract on the Chicago Mercantile Exchange. In their statement of the case Petitioners intimate that the evidence at trial was to the effect that

at that time Refco was the largest commodities future brokerage firm and held a leading position (60% of the open long interest) in the live cattle futures market. In reality, there was no evidence that Refco was the largest firm on the Chicago Mercantile Exchange. Further, the evidence was undisputed that Refco did not trade for its own account in any futures market. (TR. 1120). Exhibit 30, referred to in Petitioners' statement of the case, was an excerpt from records of the Chicago Mercantile Exchange indicating that on a single day in October *1978* Refco accounts held 60% of the open long interest on a specific date in the October *1978* live cattle futures contract.

Petitioners point to evidence that from August through October 1979 Tom Dittmer is reported to have expressed a bullish opinion, *i.e.*, an opinion that cattle prices would rise, and purportedly urged others to take long positions in the October futures market. Petitioners describe Dittmer's expressions of opinions as false. Petitioners fail to mention the undisputed evidence that from early 1979 through October 2 of 1979 in his speculative account, Tom Dittmer consistently traded the October and other live cattle futures markets from the long side consistent with a bullish opinion profiting at times, losing at others.[1]

Finally, Petitioners intimate that testimony established that deliveries by Dittmer and other customer accounts of Refco caused a drop in the futures market that, in turn, caused the cash cattle market to collapse. The transcript reference (TR. 1454) not only does not support this assertion, but is actually the deficient expert testimony referred to by the Eighth Circuit that there was "unusual" behavior occurring in the futures market in October and that "it was in some respects notable as a delivery month for live cattle."

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[1] Petitioners' description of huge profits purportedly made by Dittmer is misleading. His October contract profits from speculative trading was less than 50,000 in October. Exhibit T, p. 967. The testimony and exhibits referred to dealt with trading in other futures contracts and hedge account proceeds not profits.

The appellate court further noted that this expert never examined any trading records pertaining to Dittmer's speculative account or hedge accounts. In fact, the expert made no examination of any account or delivery records from Refco. Not only did the expert's testimony not point to Dittmer or Refco as the cause of any price increase or decrease, he testified that his analysis and conclusion were based on all trading in the October market. (TR. 1508). When posed with the undisputed figures pertaining to positions held in Dittmer's speculative and hedge accounts, the expert agreed with the Eighth Circuit's assessment that the effect of these trades would be insignificant. (TR. 1508-1510).[2]

In its Opinion, a panel of the Eighth Circuit found not one, but numerous areas in which the plaintiffs' evidence was insufficient to support the jury's verdict against Respondents. *Utesch v. Dittmer*, 947 F.2d 321 (8th Cir. 1991). These deficiencies included (1) failure to prove 1979 live cattle futures market reached an artificially high price; (2) failure to offer evidence that Petitioners could be injured by an artificially high price and a decline from that price; (3) failure to offer sufficient evidence that the October 1979 live cattle futures contract reached an artificially low price; (4) failure to offer sufficient eivdence that Respondents Dittmer and/or Refco caused an artificially low price in the futures market; (5) failed

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[2] The petitioners further failed to mention the testimony of their other expert witness, Dr. John Helmuth, concerning a study he participated in pertaining to cattle markets from January 1978 to April 1979. Helmuth concluded that during that time a phenomena sometimes occurred. He described the phenomena as a price drop in live cattle futures that would occur whenever the futures price reached his estimated cost of feeding cattle. Because of the phenomena, Dr. Helmuth concluded the live cattle futures market did not operate as an efficient price discovering mechanism and that the market operated with a consistent systematic perfectly predictable downward bias. (TR. 196). Dr. Helmuth further testified that his phenomena had *never* occurred in connection with the October 1979 live cattle futures contract. (TR. 267).

to offer sufficient evidence that any expression of opinion by Thomas H. Dittmer was false or known to be false at the time of its making; and (6) failed to offer sufficient evidence that Thomas H. Dittmer and/or Refco committed any acts constituting an illegal conspiracy.

The panel was so convinced that the evidence was insufficient that they determined it was unnecessary to reach other points raised on appeal by the Respondents including issues involving the plaintiffs' standing to bring these claims, statute of limitations as to some claims, individual plaintiff's right to recover on claims belonging to partnerships and corporations, and asserted errors in the admission of evidence. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied both by the panel and the court sitting *en banc*.

REASONS FOR DENYING THE WRIT

I. THE APPELLATE COURT'S FINDING OF INSUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT DOES NOT VIOLATE THE 7TH AMENDMENT.

There is no need for this Court to exercise its discretion to accept this matter for a review. The constitutionality of a court's power to set aside a judgment entered on the verdict based on insufficiency of evidence where a case has been submitted to a jury and decisions on sufficiency of the evidence reserved is beyond dispute both at common law and as incorporated in Rule 50(b) and (d) of the Federal Rules of Civil Procedure. *See Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967). The issue as to whether the party on whom the burden of proof rests has presented sufficient evidence to raise a question of fact for the jury is a question of law to be decided by the court. The question is not whether there is no evidence or a scintilla of evidence to support a verdict, but whether there is sufficient evidence on which the jury could reasonably find for a plaintiff. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986); *Schuykill & Dauphin Improvement & R.R. Co. v. Munson*, 14 Wall. 442 (1872).

As demonstrated below, Petitioners clearly seek this Court to simply review all evidence contained in over 2000 pages of trial transcripts and hundreds of pages of exhibits. Petitioners' accusation that the Eighth Circuit acted as a "Superjury" and dealt with this case in a conclusory, result oriented manner is not supported by the record or the appellate court's opinion. This claim seeks only to divert this Court's attention from the Petitioner's failure of proof. The appellate court's opinion clearly demonstrates it has carried out its important duty of upholding substantive law. Not only did the court focus on the law as contained in jury instructions, statutes and case law, but also conducted a thorough review of all evidence relevant to the plaintiff's sometime changing theories of market manipulation, false reports, and conspiracy under the anti-trust laws.

This litigation was the sixth appeal involving litigation against the Respondents arising out of allegations of wrongdoing in the 1979 live cattle futures contracts.[3] Indeed, the evidence Petitioners offered in support of their

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[3] As noted by the court below: "In all of them the appellants prevailed. *See Dudley v. Dittmer*, 795 F.2d 669 (8th Cir. 1986) (reversing jury verdict in favor of Refco broker under antifraud provisions of Commodities Act, and remanding for new trial on market manipulation charge under that Act); *Greenwood v. Dittmer*, 776 F.2d 785 (8th Cir. 1985) (affirming j.n.o.v. in favor of defendants in suit by Refco customer under the Commodities Act); *Horn v. Ray E. Friedman & Co.*, 776 F.2d 777 (8th Cir. 1985) (reversing jury verdict in favor of Refco broker in suit under Commodities Act and RICO); *Bone v. Refco, Inc.*, 774 F.2d 235 (8th Cir. 1985) (vacating jury verdict in favor of Refco broker for breach of contract, and remanding for new trial); *McIlroy v. Dittmer*, 732 F.2d 98 (8th Cir. 1984) (affirming jury verdict in favor of defendants in suit by Refco customer under Commodities Act.)" *Utesch*, at 323.

claim that Respondents had knowingly issued false, inaccurate reports concerning a market that had an effect on the market price was verbatim from the trial transcripts of *Horn v. Ray E. Freidman*, 776 F.2d 777 (8th Cir. 1985). Accordingly, the appellate court was in an even more experienced and heightened position to determine the sufficiency of the evidence under applicable law.

Petitioners insist that the appellate court "chose not to believe the evidence of the falsity of Dittmer's pre-October opinions about the futures market." That is clearly not the case. The Eighth Circuit in *Utesch*, as in *Horn*, held the testimony was insufficient to establish falsity particularly in light of the undisputed evidence of Thomas H. Dittmer's trading and the realities of trading in the futures market.

Not only did the Petitioners fail to offer any expert or other evidence that prices before October 2 were artificially high, as noted by the Eighth Circuit a manipulation or conspiracy to raise prices could not have damaged the Petitioners. Petitioners arguments to the contrary lack support not only in the record and the law, but in common sense. The appellate court correctly noted that an expert's testimony that a market was "unusual" does not warrant a jury in inferring that prices were artificial or that the Respondents acted illegally or caused an artificial price. Indeed, the Petitioners' expert agreed that the effect of Dittmer's trading would be insignificant. (TR. 1508-1510).

II. THE COURT OF APPEALS DID NOT RESTRICT THE RIGHT OF RECOVERY OF PRIVATE LITIGANTS UNDER SECTION 9(b) OF THE COMMODITIES EXCHANGE ACT.

Petitioners claim that the Eighth Circuit has somehow unduly restricted the right of recovery of a private litigant under Section 9(b) of the CEA is without merit. The Eighth Circuit simply required sufficient proof of

what had not only been alleged in the Complaint, *i.e.*, a manipulation of the October 1979 live cattle futures market, but what was also contained in the jury instructions. Moreover, there is no conflict between the Eighth Circuit's decision and the decision of the Second Circuit in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982).

A. The Court's Ruling Did Not Place an Unwarranted and Unreasonable Restriction on the Petitioners by Proof of an Artificial Price in the Futures Market.

As noted by the Eighth Circuit, the trial court in its instructions to the jury required the plaintiffs to prove by a preponderance of the evidence that the Defendant had intentionally manipulated the price of the October 1979 live cattle futures contract by creating an artificial price in that market, *i.e.*, a price or price trend that did not reflect the legitimate forces of supply and demand. Petitioners have not challenged those instructions and the instructions were consistent with existing law. *See Cargill, Inc. v. Hardin*, 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972). *Volkhart Bros., Inc. v. Freeman*, 311 F.2d 52 (5th Cir. 1962); *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *Great Western Food Distribs., Inc. v. Brannan*, 201 F.2d 476 (7th Cir. 1953), *cert. denied*, 345 U.S. 997 (1953); *General Foods Corp. v. Brannan*, 170 F.2d 220 (7th Cir. 1948); *In re Cox*, [1986-1987] Comm.Fut.L.Rep. (CCH ¶ 23,786); *In re Indiana Farm Bureau Coop. Ass'n., Inc.*, [1982-1984] Comm.Fut.L.Rep. (CCH ¶ 21,796).

The Petitioners attack the Eighth Circuit's holding that Petitioners, who sold cattle in the cash market, could not have been harmed by artificially high futures prices, even if such prices existed. As noted earlier, not only did the Petitioners fail to prove an artificially high price, by statistical or expert testimony, but the Eighth Circuit's

holding is consistent with both common sense and this Court's opinion in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574; 582-583 (1985) (no recovery for competitors who could not have been harmed by alleged conspiracy).

Clearly, there can be no recovery under Section 9(b) absent the showing of an artificial price in the market and evidence that the Respondents intentionally and illegally created the artificial price that could damage Petitioners. The lack of evidence to support such a finding was the Eighth Circuit's well-reasoned conclusion.

B. There Is No Conflict Between the Eighth Circuit's Decision and the Second Circuit's Decision.

Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch Pierce Fenner & Smith v. Curran, supra*, had nothing to do with the proof required to establish market manipulation. The Second Circuit's decision and this Court's decision dealt only with the existence of an implied private cause of action under Section 9(b) of the Commodities Exchange Act. Indeed, in considering the question this Court stated, "For purposes of considering the question whether Respondents may assert an implied cause of action for damages, *it is assumed that each of the petitioners has violated this statute and thereby caused respondents' alleged injuries.*" *Curran*, 456 U.S. at 374. (Emphasis added.)

Accordingly, the Petitioners claim of a conflict among the Circuits is not only illusory, but nonexistent.

III. THE COURT CORRECTLY APPLIED PERTINENT LAW TO EVIDENCE PERTAINING TO THE PETITIONER'S CLAIM OF CONSPIRACY UNDER SECTION 1 OF THE SHERMAN ACT.

Petitioners erroneously attempt to narrow the scope of the Eighth Circuit's dismissal of the anti-trust claim. The dismissal was not based upon a narrow technical

rule that Dittmer could not have conspired with his own firm or a rejection of a legal doctrine, and was not inconsistent with any decision by this Court of the Circuit Courts of Appeals.

The Court of Appeals concluded that the evidence was insufficient to support a finding that Refco or anyone entered into any alleged conspiracy. Further, the Court stated, "The evidence would not support a jury finding that any of the alleged co-conspirators engaged in a conspiracy or combination with Dittmer to lower prices in the October, 1979 cattle futures market." 947 F.2d at 330. The Court of Appeals went on to state "In sum, the evidence simply does not support the jury's verdict that Dittmer and Refco engaged in a conspiracy or combination to lower the prices of the October 1979 futures contract, in violation of Section 1 of the Sherman Act. Much of the alleged conspiratorial conduct has not been shown to be anything more than normal legitimate trading activity." 947 F.2d at 331. Given its conclusions based upon a review of the evidence, the Court of Appeals' decision was undeniably supported by the applicable case law.

Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, generally prohibits contracts, combinations or conspiracy in restraint of trade or commerce among the states or with foreign nations. See *Ewald Bros., Inc. v. Mid-American Dairymen, Inc.*, 877 F.2d 1384, 1386 (8th Cir. 1989). As the Ninth Circuit has noted:

> To establish a violation of Sherman Act § 1, 15 U.S.C. § 1, a party must present evidence of the existence of three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition, and (3) which actually causes injury to competition beyond the impact on the claimant, within a field of commerce in which the claimant is engaged.

Eichman v. Fotomat Corp., 871 F.2d 784, 795 (9th Cir. 1989).

The law is clear that § 1 of the Sherman Act does not prescribe independent action, but rather requires a showing of a combination, contract or conspiracy to restrain trade. The Petitioners contended that Dittmer, Refco, and a corporation in which Dittmer owned interest, Cactus Feeders, Inc. had conspired to restrain trade in October 1979 live cattle futures contract. Of course, the evidence demonstrated that neither Refco nor Cactus Feeders, Inc. conducted trading in the October 1979 live cattle futures contract in its own trading account and could not force a market up or down.

A plaintiff in an anti-trust case has a heavy burden of proving the existence of an illegal conspiracy. As noted in *H.J., Inc. v. International Tel. and Tel. Corp.*, 867 F.2d 1531, 1544 (8th Cir. 1989): As a general principle, the existence of illegal conspiracies and restraint to trade is not lightly inferred, especially when the actions complained of may carry beneficially competitive results. (Citations omitted.)

In the instant case it is clear that not only is there no proof of conspiracy, but there is not even evidence from which a conspiracy could be lightly or otherwise inferred. Clearly, market participants are entitled to trade in their own best interests. The fact that Thomas H. Dittmer or others traded in the October 1979 live cattle futures contract or made deliveries is not illegal or in violation of any law. In an anti-trust conspiracy case it is incumbent on the plaintiff to establish that a conspiracy existed and to exclude the possibilities that alleged co-conspirators acted independently. *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574 (1985). Moreover, actions consistent with permissible competition do not support even an inference of conspiracy. *Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984).

CONCLUSION

The Eighth Circuit correctly applied the law and carefully scrutinized the evidence in this matter. A litigant's understandable disappointment at an appellate court's finding that their evidence is insufficient does not translate into a violation of the Seventh Amendment nor warrant a request for this Court to review the voluminous transcripts and record in this matter.

Respondents respectfuly request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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